86-1081

Supreme Court, U.S.
FILED
SEP 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1986

NO. A-80

CHARLES W. EWING and CHARLOTTE A. EWING,

Appellants,

v.

EDGAR L. LINDLEY,
TAX COMMISSIONER OF OHIO,

Appellee.

ON APPEAL FROM THE OHIO SUPREME COURT

APPENDIX

Charles W. Ewing
491 City Park (614) 469-0941
Columbus, OH 43215-5706
Attorney for Appellants

NO. A-80

In The
Supreme Court of the United States
October Term, 1986

Charles W. Ewing and Charlotte A. Ewing,
Appellants,
v.
Edgar L. Lindley,
Tax Commissioner of Ohio,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

A P P E N D I X

Appendix I	Supreme Court of Ohio Mandate-May 7, 1986
Appendix II	Supreme Court of Ohio Judgment Entry-5-7-86
Appendix III	State of Ohio Board of Tax Appeals Decision & Order-July 17, 1985
Appendix IV	State of Ohio Department of Taxation Journal Entry of the Tax Commissioner October 7, 1982
Appendix V	Notice of Appeal to the Supreme Court of the U.S.
Appendix VI	Ohio Revised Code 5739.33 14th Amendment - U.S. Constitution I.R.S. Code Sec. 6672(a)

APPENDIX I

THE SUPREME COURT OF OHIO

COLUMBUS

1986 TERM

To wit: May 7, 1986

Case No. 85-1303

Charles W. Ewing et al.,
Appellants,

v. MANDATE

Edgar L. Lindley, Tax Commr.,
Appellee.

To the Honorable Board of Tax Appeals.

Within and for the County of Franklin, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution.

Decision of the Board of Tax Appeals is affirmed for the reasons set forth in the opinion rendered herein.

COSTS;

Filing Fee Affidavit of Poverty filed.

/s/
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this date_____.

JAMES WM. KELLY CLERK

/s/ DEPUTY

APPENDIX II

THE SUPREME COURT OF OHIO

COLUMBUS

1986 TERM

To wit: May 7, 1986

Case No. 85-1303

Charles W. Ewing et al.,
Appellants,

v. JUDGMENT ENTRY

Edgar L. Lindley, Tax Commr.,
Appellee.

APPEAL FROM THE
BOARD OF TAX APPEALS

This cause, here on appeal from the Board of Tax Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, decision of the Board of Tax Appeals is affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered that the appellee recover from the appellants its costs herein expended; and that a mandate by sent to the Board of Tax Appeals to carry this judgment into execution; and that a copy of this entry by certified to the Board of Tax Appeals for Franklin County for entry.

/s/
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this date_____.

JAMES WM. KELLY CLERK

/s/ DEPUTY

APPENDIX III JUL 17 1985

BOARD OF TAX APPEALS
STATE OF OHIO

Charles W. and
Charlotte A. Ewing, CASE NO. 82-B-1040

Appellants,

(SALES TAX)

vs.

Edgar L. Lindley, DECISION AND ORDER
Tax Commissioner of Ohio,

Appellee.

APPEARANCES:

For the Appellant -
Charles W. Ewing and
Charlotte A. Ewing, pro se
26 Belle Court
Pickerington, Ohio 43147

For the Appellee -
Anthony J. Celebrezze, Jr.
Attorney General
By: Richard C. Farrin
Assistant Attorney General
State Office Tower
30 East Broad Street
Columbus, Ohio 43215

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed

herein under date of November 8, 1982, by the appellants above named. This appeal is from a final order of the Tax Commissioner dated October 9, 1982, wherein said official dismissed the appellants' petition for reassessment.

The body of the final order of the Tax Commissioner reads as follows:

> "Charles W. and Charlotte A. Ewing and Earl J. Bowmar were assessed personally as responsible officers of Ewing Lumber Company, Inc., pursuant to Section 5739.33 of the Ohio Revised Code. Petitions for reassessment were filed on behalf of all three assessees.
>
> "From the evidence presented, it is determined that Earl J. Bowmar is not a proper party to this assessment and his name will be removed.
>
> "The petition for reassessment filed by Charles W. and Charlotte A. Ewing does not contest their position as responsible officers. The Ewings question the amount of the assessment and request equitable relief. Objections to the amount of the of the assessment and request equitable relief. Objections to the amount of the

assessment are not well taken. The Tax Commissioner does not have equity jurisdiction. The amount assessed is proper and will stand as issued.

"The request for remissions of the penalty is denied."

The appellants' notice of appeal reads, in pertinent part:

"1) Section 5739.33 violates the U.S. Constitution in that it applies strict liability upon Appellants with no finding of willful withholding of alleged monies due the State, thereby depriving Appellants of their constitutional rights.

"2) The procedures involved in the alleged hearing by the Tax Commissioner violate Appellants' rights to due process of law as guaranteed by the U.S. Constitution.

"3) The assessments in question are so vague as to be impossible of interpretation., To impose liability upon such allegations would be violative of Due Process of Law guaranteed by the U.S. Constitution.

"4) The State seekd [sic] to impose derivative personal liability on Appellants as corporate officers, when the final cause of the corporations's inability to remit

the alleged taxes due is from the use of a state statute allowing prejudgment attachment of all the corporate assets, which statute has been declared unconstitutional. Said prejudgment attachment was effected in August of 1980, with the assets of the corporation then being improperly and illegally sold for approximately 15c on the dollar of valuation. This was all done without judgment and over the protest of the corporation and Appellants. It is now over two years since the illegal taking sanctioned by the State and ultimate conversion by Huntington National Bank of corporate assets and no judgment has yet been received by Huntington National Bank , said actions again violating the rights of Appellants as guaranteed by the U.S. Constitution.

"5) The assessments are void since the applicable statutes of limitation are exceeded."

The appellants, in the hearing and in their post hearing brief, stated that the Tax Commissioner had not given appellants an accounting of the assessment, and that the Tax Commissioner had not gone forward with any proof of

the accuracy of the assessments against appellants.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the briefs supplied by the parties, the statutory transcript certified by the Tax Commissioner, and the record of the hearing.

The Board of Tax Appeals notes that the Board has no jurisdiction to hear the constitutional arguments advanced by the appellants. S. S. Kresge Co. v. Bowers (1960), 170 Ohio St. 405.

The Tax Commissioner assessed the subject tax against the appellants as responsible officers of Ewing Lumber Company pursuant to Ohio Revised Code Section 5739.33. R. C. 5739.33 States in part:

> "If any corporation required to file returns and to remit tax due to

> the state under the provisions of sections 5739.01 to 5739.31, inclusive of the Revised Code, fails for any reason to make such filing or payment, any of its officers, or employees having control or supervision or charged with the responsibility of filing returns and making payments, shall be personally liable for such failure."

The Board of Tax Appeals observes that the appellants have not contested the Tax Commissioner's finding that the appellants were responsible officers. Instead, the appellant contended that there was no adequate accounting or communication of the assessment to the appellants. The Board notes that pursuant to R. C. 5739.33 the appellants could not challenge the accuracy of the underlying assessment. Rowland v. Collins (1976), 48 Ohio St. 2d 311.

It is the order of the Board of Tax Appeals that the final order of the Tax

Commissioner must be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

/s/
Chairman

APPENDIX IV

823 & 824

STATE OF OHIO
DEPARTMENT OF TAXATION

OCT 07 1982
JOURNAL ENTRY
OCT 9 1982

In the matter of Sales Tax
Assessment, Serial No. 8160222

Charles W. and Charlotte A. Ewing
Officers of Ewing Lumber Company, Inc.
50 West Church Street
Pickerington, Ohio 43147

Vendor's License No. 23-017597

The Tax Commissioner came to consider the above styled matter at a hearing on September 25, 1981 at Columbus, Ohio. The assessees, Earl Bowmar and Charles Ewing appeared at the hearing.

Now, being fully advised thereon, the Commissioner finds that:

Charles W. and Charlotte A. Ewing and Earl J. Bowmar were assessed personally as responsible officers of Ewing Lumber Company, Inc., pursuant to Section 5739.33 of the Ohio Revised Code. Petitions for reassessment were filed on behalf of all three assessees.

From the evidence presented, it is determined that Earl J. Bowmar is not a proper party to this assessment and his name will be removed.

The petition for reassessment filed by Charles W. and Charlotte A. Ewing does not contest their position as responsible officers. The Ewings question the amount of the assessment and request equitable relief. Objections to the amount of the assessment are not well taken. The Tax Commissioner does not have equity jurisdiction. The amount assessed is proper and will stand as issued.

The request for remission of the penalty is denied.

Therefore, it is the order of the Tax Commissioner that the name of Earl J. Bomar be removed from this assessment and that the assessment stand as issued against Charles W. and Charlotte A. Ewing in the following amount:

Assessment (Sales Tax)	Penalty	Total
$77,360.81	$11,604.12	$88,964.93
Less Adjustments to Assessment Numbers:		
7843248----------	$12,356.36	
7900916----------	10,797.94	
8007237----------	1,000.00	
Total Adjustments----------		
	----$24,163.30	
Total Sales Tax Due----------	$64,801.63	

The law provides that the unpaid amount of tax shall bear interest at the rate of six percent per annum from December 1, 1980 to the date of payment.

/s/ Edgar L. Lindley

Edgar L. Lindley
Tax Commissioner

I hereby certify the foregoing to be a true and correct copy of the action of the Tax Commissioner taken this day with respect to the above matter.

/s/

Edgar L. Lindley
Tax Commissioner

APPENDIX IV

826 & 827

STATE OF OHIO
DEPARTMENT OF TAXATION

OCT 07 1982
JOURNAL ENTRY
OCT 9 1982

In the matter of Sales Tax
Assessment, Serial No. 8160616

Charles W. and Charlotte A. Ewing
Officers of Ewing Lumber Company, Inc.
50 West Church Street
Pickerington, Ohio 43147

Vendor's License No. 23-017597

The Tax Commissioner came to consider the above styled matter at a hearing on September 25, 1981 at Columbus, Ohio. The assessees, Earl Bowmar and Charles Ewing appeared at the hearing.

Now, being fully advised thereon, the Commissioner finds that:

Charles W. and Charlotte A. Ewing and Earl J. Bowmar were assessed personally as responsible officers of Ewing Lumber Company, Inc., pursuant to Section 5739.33 of the Ohio Revised Code. Petitions for reassessment were filed on behalf of all three assessees.

From the evidence presented, it is determined that Earl J. Bowmar is not a proper party to this assessment and his name will be removed.

The petition for reassessment filed by Charles W. and Charlotte A. Ewing does not contest their position as responsible officers. The Ewings question the amount of the assessment and request equitable relief. Objections to the amount of the assessment are not well taken. The Tax Commissioner does not have equity jurisdiction. The amount assessed is proper and will stand as issued.

The request for remission of the penalty is denied.

Therefore, it is the order of the Tax Commissioner that the name of Earl J. Bomar be removed from this assessment and that the assessment stand as issued against Charles W. and Charlotte A. Ewing in the following amount:

Assessment	Penalty	Total
(Sales Tax)		
$40,837.53	$6,125.63	$46,963.16
(Delinquency Charge)		
396.00	59.40	455.40
Total Sales Tax and Delinquency Charge --		----$47,418.56
Less Adjustments to Assessment Numbers:		
7944841----------		$19,359.59
7946971----------		14,701.31
Total Adjustments----------		----$34,060.90
Total Sales Tax and Delinquency Charge Due---$13,357.66		

The law provides that the unpaid amount of tax and delinquency charge shall bear interest at the rate of six percent per annum as of the thirty-

first day after service of the notice of assessment to the date of payment.

/s/ Edgar L. Lindley

Edgar L. Lindley
Tax Commissioner

I hereby certify the foregoing to be a true and correct copy of the action of the Tax Commissioner taken this day with respect to the above matter.

/s/

Edgar L. Lindley
Tax Commissioner

APPENDIX V

IN THE SUPREME COURT OF THE STATE OF OHIO

Charles W. and
Charlotte A. Ewing,

Case No. 85-1303

Defendants/Appellants,

vs.

Edgar L. Lindley
Tax Commissioner of Ohio

F I L E D
JUN-6 1986
BOARD OF TAX APPEALS
Columbus, Ohio

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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1. Notice is hereby given that Charles W. and Charlotte A. Ewing, the Defendants-Appellants above named, hereby appeal to the Supreme Court of the United States from the final order affirming the judgment of the Board of Tax Appeals, entered in this action on May 7, 1986.

This appeal is taken pursuant to 28 U.S.C., Sec. 1257(2).

2. The Clerk will please prepare the entire transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all exhibits.

3. The following question is presented by this appeal:

> Whether Ohio Rev. Code Sec. 5739.33 unconstitutionally violates the Due Process Clause of the 5th and 14th amendments of the Constitution of the United States by applying strict liability upon a certain class of officers and employees of a corporation for the corporation's failure to pay sales tax without any finding of a wilfull failure to pay such taxes either by the officers and employees or by the corporation.

Respectfully submitted,

CHARLES W. EWING CO., LPA

/s/

Charles W. Ewing
Attorney for Charlotte A. Ewing
3620 N. High Street-Suite 209
Columbus, OH 43214
(614) 267-0941

/s/
Charles W. Ewing, pro se
3620 N. High Street-Suite 209
Columbus, OH 43214
(614) 267-0941

CERTIFICATE OF SERVICE

I do hereby certify that I served the above document by regular mail, postage prepaid, on all parties as listed below this 6th day of June, 1986.

Anthony J. Celebrezze, Jr.
Attorney General
30 E. Broad Street
Columbus, OH 43215

/s/
Charles W. Ewing

APPENDIX VI

SECTION 5739.33 OF OHIO REVISED CODE

If any corporation required to file returns and to remit tax due to the state, under the provisions of Sections 5739.01 to 5739.31, inclusive, of the Revised Code, fails for any reason to make such filing or payment, any of its officers, or employees having control or supervision of or charged with the responsibility of filing returns and making payments, shall be presonally liable for such failure. The dissolution of a corporation shall not discharge an officer's or employee's liability for a prior failure of the corporation to rile returns or remit tax due. The sum due for such liability may be collected by assessment in the manner provided in Section 5739.13 of the Revised Code.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persona born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers os a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States,

authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section4. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Effective 1868)

INTERNAL REVENUE CODE

Section. 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax.

(a) General rule.-Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall in addition to other penalties provided by law, be liable to a penalty equal to the total amount or the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.